No. 9277

United States
Circuit Court of Appeals
For the Ninth Circuit /3

UNION OIL COMPANY OF CALIFORNIA, a Corporation,
Appellant,

vs.

JAMES RALPH HUNT, *Appellee.*

Brief of Appellant

Appeal from the District Court of the United States
for the District of Oregon.

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Attorney for Appellant.

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Attorney for Appellee.

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JURISDICTIONAL STATEMENT

It is believed this Court on appeal has jurisdiction for the reason the appeal is from a final judgment entered in the District Court (28 USCA, Sec. 225). The District Court acquired jurisdiction through removal from the State Court on defendant's petition for removal alleging facts showing diversity of citizenship between the parties which was uncontroverted (28 USCA 71). It is an ad-

mitted fact that at the time of the commencement of the within action, namely May 16, 1936 (T. 163) plaintiff was a resident and citizen of the State of Oregon and that defendant was a resident and citizen of the State of California (T. 2, 14) and the amount in controversy exceeded the sum of $3000.00.

STATEMENT OF CASE AND SUMMARY OF LAW

Plaintiff, a young man in his early twenties, was working as a filling station attendant at a filling station located at Fargo and Union Streets in the City of Portland, Oregon. His work consisted of the usual work around a filling station and occasionally changing and repairing automobile tires. On either June 11th or June 12th, 1934, while using a tire iron and prying on an automobile tire, plaintiff suffered a severe sprain in the lower part of his back.

> (T. 38) "Well, I put the large tire iron in and pried down on it, and as I pried on this tire iron the tire iron slipped and I fell forward, and at the time something snapped in my back just like it was an elastic band, I could hear it pop, and I fell down to the pavement and for two or three minutes, why I didn't have any use of my legs at all, they were paralyzed, and after I got the use of my legs I went into the station and I gave up all hopes of fixing this tire. * * *
>
> "I didn't do any hard work, just puttered around the station, put gas in the cars and check tires, and then went back after about the tenth day and got this new brace, and then he told me to wear this brace and return to work, with instructions that I was to do

light, easy work. I went back to work, and then I did this light work around there for a while. My back continued to bother me all the time. I couldn't lift anything heavy or strain myself, but as time went on, why the work increased at the station and I got in and I had to do my part of the work. I lubricated cars and I strained myself, and I repaired tires.

Q. Now, you say this back bothered you. Just what do you mean by that?

A. Well, it was a constant pain there. If I would strain myself the pain would go up from my back and it would ache, I would have to sit down and rest, and it made me irritable, and there was always a dull ache right between my hips."

The filling station was being operated by the Union Service Stations, Inc. (Originally named as a defendant in this action but dismissed from the case as Plaintiff's claim was limited to a subsequent injury sustained while working for defendant Union Oil Company and which plaintiff claimed aggravated this prior injury.) This filling station had been taken over on July 1, 1934, and the operation of it continued by the Union Oil Company. The Union Oil Company absorbed its subsidiary, the corporation known as the Union Service Stations, Inc., and assumed all its liabilities as of said date. Plaintiff continued to work at the same filling station after July 1, 1934, but as an employee of defendant Union Oil Company after said date.

Plaintiff, on June 12, complained that his back was hurting him as a result of the sprain and was sent by his employer to Dr. E. W. Simmons, who taped his back and saw him a time or two and then, as his back was not responding to the usual treatment, referred him to a bone specialist, Dr. R. B. Dillehunt, Portland, Oregon, who placed plaintiff first in a corset-like brace for his lower back and then had a special steel brace made which fit under the plaintiff's armpits and extended down to his hips and held his spine rigid. Plaintiff, from the time of the sprain in June, 1934, continued to wear this brace constantly except on occasions when in bed. He returned to his work at the filling station and was instructed to do light work only. (T. 39).

On November 5, 1934, while working for appellant, Union Oil Company, at said service station, plaintiff received a telephone call from an unidentified automobile owner who wanted a flat tire changed on his Plymouth automobile. It was shortly before three p. m., at which time plaintiff was scheduled to go off duty. Plaintiff was working alone at the filling station and when he was there alone he was in charge of the filling station (T. 50). Another employee who was to relieve plaintiff at three p. m. came a little early and plaintiff arranged with this employee to take his place at the station and plaintiff, driving his own Ford automobile, went to the place where the automobile tire was to be changed, which was about

a mile and a half from the station where plaintiff was working and only a few blocks from another Union Oil Station (T. 41). The tire to be changed was on the right rear wheel of a 1930 or '31 Plymouth Coupe automobile (T. 93). Plaintiff testified that the owner of the car who wanted the tire changed was drunk (T. 42). Plaintiff could get no help from him. Plaintiff used an ordinary Ford jack out of his own car. He crawled under the Plymouth, jacked it up and while crawling out, the car slipped off the jack and struck his back in the region of his sprain. Plaintiff testified it knocked him out temporarily, that he then got up and went down to the nearest Union Oil Service Station and got an attendant there to come back with him to the place of the accident. This attendant changed the tire on the Plymouth and then together with plaintiff drove back to the filling station where plaintiff worked. Plaintiff in considerable pain then drove his own car home, and after making telephone arrangements was driven several miles by his wife to Dr. Dillehunt's office. Dr. Dillehunt informed plaintiff that a fusion operation on his spine would be required to give him permanent relief. Plaintiff was confined to his bed to rest for a short period (no other treatment was given him). He lost no time from the payroll and did light work and continued to receive full pay until he entered the hospital on February 28, 1935, for the operation referred to.

Appellant Union Oil Company was under the State Compensation Act during June, 1934 and under the State Act no action could be maintained against it for plaintiff's original injury in June. It was not under the Oregon State Workmen's Compensation Act on November 5, 1934. It did, however, carry an insurance policy with a workmen's compensation endorsement with the Hartford Accident and Indemnity Company (T. 153 d. ex. 26), which workmen's compensation endorsement incorporates into it the Oregon State Workmen's Compensation Act and provides for the payment of compensation and other benefits by the insurance company to any injured workman willing to accept same, whether injured through the negligence of anyone or not, in lieu of the injured workman's right to bring action against his employer, all benefits and compensation payments in identical amounts as prescribed by the Oregon State Workmen's Compensation Act. An identical policy in form and coverage issued by this insurance company covered the predecessor company Union Service Stations, Inc., as operator of said service stations, and plaintiff as an employee thereof prior to and during June, 1934, which coverage expired on July 1, 1934, and was superceded by the policy referred to above. Plaintiff on February 28, 1935, with Mr. Russell, a supervisor of the Union Oil Company and his superior, went to the office of the claims adjuster of the Hartford Accident and

Indemnity Company, in the Lewis Building, in Portland, Oregon. The stipulated facts are: (T. 106, 107)

"The claims adjuster was already acquainted with plaintiff's prior accident of June 11, 1934, and plaintiff informed the claims adjuster of his second accident of November 5, 1934, telling him that a car had slipped off a jack striking him on the back, that he had gone to Dr. Dillehunt and Dr. Dillehunt had recommended a fusion operation of his spine. *Plaintiff inquired whether the insurance company would take care of the matter.* The claims adjuster for the insurance company said that the insurance company would pay for the operation and pay plaintiff's other medical and hospital expenses and pay the plaintiff compensation at the same rate as prescribed under the State Workmen's Compensation Act. Plaintiff then went to the hospital on February 28, 1935, and a fusion operation on his spine was performed by the said Dr. Dillehunt. Plaintiff was in the hospital from February 28, 1935, until April 20, 1935, and was convalescing from the time he was discharged from the hospital until June 24, 1935, at which time he was discharged by Dr. Dillehunt as completely cured and able to return to work and at that time plaintiff went back to work at a filling station of the defendant. He was given light work for the first few weeks and then reassumed his regular work. Plaintiff after the operation was able to discard his back brace and has never had to wear it since his operation. Plaintiff continued working as a service station attendant for the defendant and at the same station where he testified he was working when the accident occurred which brought on his back trouble. Plaintiff continued on at this same service station after he left the employ of the defendant, this service station having been leased by the plaintiff and another from the defendant and they continued operating it until about February 1, 1938, at which time plaintiff discontinued his employ-

ment at the service station and entered the employ of the American Tobacco Company, where he has been working ever since. His work for the American Tobacco Company is that of salesman. He drives a light delivery truck covering a territory out of Chico, California. At the time plaintiff went to the hospital for his operation until he returned to work several months later, he was dropped from the payroll of the Union Oil Company. During this period he received compensation payments from the Hartford Accident and Indemnity Company about every two weeks. The amount of his compensation payments was the same as prescribed under the Workmen's Compensations Act of the State of Oregon."

From February 28, 1935, until June 24, 1935, plaintiff received compensation payments from the Hartford Accident and Indemnity Company (T. exhibits). These payments ceased when plaintiff was discharged by Dr. Dillehunt as "recovered" and he resumed his work and went back on the payroll of his employer. The total paid to plaintiff and for his benefit is the sum of $813.15, as follows: Paid Dr. Dillehunt his bill for performing the operation in the sum of $414.50 (T. 153) and hospitalization for the plaintiff in the sum of $163.50; paid $235.30 to plaintiff, on drafts with notation indicating Ralph Hunt (plaintiff) was the "Injured or claimant," that the nature of the payment was compensation for a certain period, giving date of injury, and on each draft

it appears that the acceptance of the payment constitutes a clear release of his claim. An insurance policy is referred to on the drafts and payments were made under both policies.

The first two drafts referred to the accident as having happened on November 5, 1934. All the subsequent drafts referred to the accident as having happened on June 11, 1934. The claim agent for the insurance company explained that after payments had started, a change had been made in this respect as the doctor notified him that the injury to plaintiff's back was a recurrence of his injury of June 11th; that his company had had a policy in force for both periods and it didn't make any difference which one it was charged to.

(T. 136) "Q. Mr. Hadfield, I was asking you about the drafts, and I noticed one bears the number 543012, and one bears the number of 519380, giving policy numbers. How is it that there were two different policy numbers there on the drafts?

A. Well, that would come on the expiration of one policy and another one started. These policies run for a year at a time. * * *

(T. 137) Q. So there was a policy in force, then, both in June and in November, is that correct?

A. Yes, sir.

Q. And some of the drafts here were paid under one policy and some the other, is that correct?

A. That is right.

Q. So, so far as policy coverage was concerned, it didn't make any difference whether—(Interrup-

tion) the operation, if it was a recurrence of the first injury, we had nothing to do but to take care of it."

(T. 142) "Mr. Powers: Except that there was some reason why, when they first started paying under the second policy, the Union Oil Company policy, to show why they went back and started charging it up to the first policy again, the operation and the claim from November 5th.

(Further discussion)

Mr. Powers: Q. Can you state to the jury why that was, whether you had any conversation with the doctor about it?

A. Yes. Dr. Dillehunt informed us that it was a recurrence of July the 11th.

Q. Was that July or June?

A. Or June the 11th, pardon me.

Mr. Rauch: I didn't quite get your answer, Mr. Hadfield.

A. I said Dr. Dillehunt informed us this November 5th injury was a recurrence of the injury of June 11th.

Mr. Powers: Q. And that was the reason two different charges were made there against the different policies?

A. Yes."

It was alleged in appellant's answer that plaintiff's operation was necessitated by reason of a congenital anomaly, subject to stress and strain and was performed to strengthen his back and cure a chronic instability. (T.12)

Plaintiff admits that these sums were paid to him and paid for his benefit under the arrangement he had with the claims adjuster for the insurance company.

(T. 109) "Q. Then you got your wages right through from July 1st, 1934, or, for that matter, in June also of 1934, the time the first accident occurred, you got your wages right through up to the time you went into the hospital?

A. Yes, sir.

Q. Then, when you went into the hospital for the operation you got compensation payments?

A. That is right.

Q. And you got those compensation payments during the time that you were unable to go to work, during the time you were in the hospital and the time that you were off work?

A. Yes, sir.

Q. And that period ended about June 24th, 1935?

A. Right." * * *

(T. 111) "Q. Did you know that you were going to receive compensation payments when you were in the hospital?

A. Yes, sir.

Q. How did you know that?

A. Well, Mr. Russell told me that when I went to the hospital that I would go off of full salary.

Q. That you would go off of full salary?

A. Yes.

Q. And were you told that you would receive compensation payments and that the doctor bills would be paid for you?

A. Yes, sir.

Q. And you accepted those?
A. Did I accept the checks?

Q. You accepted the compensation payments and the payment of the doctor bills?

A. I accepted them, yes.

Q. You accepted those from the Hartford Accident and Indemnity Company; you knew there was a policy there, didn't you?

A. I surmised there must be or they wouldn't be paying it."

* * * *

(T. 112) "Q. Well was there a discussion there that that was the basis that the State Compensation fund pays?

A. I don't remember anything—if I remember right I think he said that fifty-three per cent would be a little more than what I would be paid ordinarily.

(T. 113) Q. Under the Compensation?

A. Under Compensation.

Q. Well, wasn't that because they gave you credit because of the extra money you had made because of the commissions? They took that into consideration to get your salary up a little bit for you to help out in going into that operation and get you a little more money per month?

A. That is right. I was entitled to that.

Q. And you had a choice then of going in and taking those compensation payments and having the bills paid for you or else suing the Union Oil Company, isn't that so? You could do one or the other?

A. Well, I imagine so. At the time I was interested in getting well.

Q. Yes, and you thought it was better to take these compensation payments and have your bills paid than to go into a lawsuit with them?

A. I didn't think anything about that.

Q. Well, that was the proposition, wasn't it, whether you would take the compensation payments and the—

A. There was nothing—well, they told me that they would pay my salary in the form of compensation, yes. * * *

(T. 117) Mr. Powers: "Q. You knew that was on the back of the checks, in other words?

A. Well, when I signed the checks it stated on the back that it was for the compensation for that lost time while I was in the hospital. * * *

(T. 129) Q. The compensation payments that you thought you were receiving there, Mr. Hunt, were they figured out down in Mr. Hadfield's office that day, the percentage you would get of your wages?

A. The compensation checks, they figured out it would be approximately fifty-three per cent.

Q. And that corresponded with the Industrial Accident Commission of the State?

A. I think so."

THE ISSUES of negligence as finally made up under plaintiff's complaint were whether the defendant Union Oil Company was negligent (a) in failing to furnish plaintiff with a safe automobile jack, and (b) whether

the defendant was negligent in failing to furnish plaintiff with an able-bodied assistant.

The action proceeded under common law, and plaintiff's remedy, if any, is governed by the common law. There was charged in the complaint that the action was under the Employer's Liability Act of Oregon. The District Court, however, ruled that the case did not fall within the provisions of the Employer's Liability Act and withdrew from the jury all questions of statutory liability and submitted the case to the jury solely under common law liability. (T. 166)

The answer denied any negligence and pleaded affirmatively (a) that the plaintiff had assumed the risk, if any there was, in using his own jack; (b) that plaintiff had been paid for the same injuries for which he was seeking to recover in the complaint and plaintiff had agreed to and did compromise his claim; and (c) contributory negligence.

The evidence respecting the jack was that plaintiff had used his own jack which he carried in his Ford automobile, that there was a jack at the station where he worked, that had a long handle on it and one that could be used without getting under a car, that he had not taken this jack with him, because he said it was too heavy for him to handle alone (T. 54) and that if an able-bodied man at the station had put it in his car for him he would have been unable to get it out of his car alone (T. 54).

Plaintiff testified he did not like to use the long-handled jack (T. 48, exhibit shown by photograph T. 150) because when he went to lower it he had to jiggle it to make it work. He stated that the station jack could be used without the necessity of getting under the car (T. 103). Plaintiff testified as to the occurrence of the accident:

(T. 44) "Q. The car fell off the jack?

A. Yes.

Q. What did it land on, the wheel, the flat tire?

A. It landed on the flat tire.

Q. Did you know it was going to fall?

A. No, I didn't know it was going to fall.

Q. It just fell.

A. It just fell.

Q. Well now, you say that jack of yours was safe enough?

A. Well, I thought it was safe enough. I had used it before.

Q. It didn't have anything to do with it there; as far as your jack was concerned, you felt it was all right to use?

A. Yes, sir. * * *

(T. 45) Q. Well now, what was wrong with that jack as far as operating on this particular car was concerned?

A. It was a short-handled jack. You had to climb back underneath the car and insert a small little handle into it and jack it up, and it had a flat top on the jack. It might have had a prong tip jack to clamp around that axle and hold it on.

Q. Couldn't you reach it from out in back?

A. No, sir.

Q. Well, why was it you couldn't reach it?

A. Well, understand my back is stiff all the time, and with that brace on there was no give. I had to be in straight position to work on the car.

Q. Well, as I understand you to say, the handle was too short?

(T. 46) A. Yes, this was a short handled jack.

Q. And you were complaining because it didn't have a longer handle there, one of those that fold up?

A. It could have had a folding up handle that extended out beyond the rear end."

There was no evidence that the shortness of the jack handle or the length of the jack handle had anything to do with causing the car to slip off the jack. The record is silent as to why the car slipped off the jack. There is nothing to indicate whether the jack was improperly placed under the axle or whether the brake was set or other factors which might cause a car to slip off of a jack. The evidence shows the length of the handle had nothing to do with the accident other than plaintiff accounts for his being under the car because of the shortness of his *own* jack handle. Plaintiff testified that the car on which he was changing the tire, had a longer rear overhang than

his own car. It is significant that another employee went ahead, changed the tire using the jack without trouble (T. 91).

Plaintiff undertook to change this tire of his own accord; no one in the company asked him to; moreover there was another Union Oil Service Station located close to where the tire was to be changed and the plaintiff could have had an employee from there go and change the tire.

> (T. 50) "Q. But if you had been there alone like you were you could have called that other station and had someone else go over there, couldn't you, and fix that tire?
>
> A. I could have, yes."

As to what an able-bodied assistant would have done had he gone, plaintiff testified:

> (T. 44) "Q. Now, you complained in your complaint about not furnishing you with an able bodied assistant. What would you have had the able bodied assistant do if you had had one along with you?
>
> (T. 45) A. Well, if I had had an assistant along with me he'd have got down there under the car and jacked it up.
>
> Q. He would have got hit in the back then instead of you?
>
> A. Well, he probably would have.
>
> Q. Well, only one man works under a car anyway, isn't that a fact?
>
> A. That is a fact.

Q. It wouldn't have taken both of you under there?

A. No, but the —

Q. What is that?

A. I didn't say anything."

* * *

Plaintiff never complained to defendant or any of its employees about the jack furnished by the defendant and never complained about using his own jack and never complained that the handle was too short on his own jack and never complained that it was improper or unsatisfactory to use.

Plaintiff filed no reply to defendant's answer respecting the compensation payments made to him and for his benefits. There was no affirmative pleading on the part of plaintiff that there was any fraud or misrepresentation concerning this matter or any allegation of a mistake. Plaintiff admitted that these sums were paid to him and for his benefit but claimed that he had never seen the policy of insurance until during the trial although in his first complaint filed in 1936, it was alleged affirmatively that the Union Oil Company had rejected the Workmen's Compensation Act, and a copy of one of the policies was marked as an exhibit and filed with clerk as such during pre-trial of case held several days before regular trial.

BRIEF SUMMARY OF LAW POINTS

(a) Did the plaintiff assume the risk of using his own jack?

(b) Is the jack a simple tool and if so, has an employer under common law the duty of furnishing safe and adequate simple tools?

(c) Can the plaintiff retain the fruits and benefits of his contract with the insurance company for the same injuries and still sue his employer in tort, especially in the absence of any allegation of fraud or misrepresentation or mistake?

(d) Does not recovery herein amount to double compensation for the same injury?

(e) Does this not constitute the splitting of a demand or cause of action?

(f) Has not plaintiff reached an accord with and had satisfaction from his employer's insurance carrier?

(g) Do not the endorsements on the drafts and dealings by the parties constitute a release; and does not the receipt of compensation payments by the plaintiff and the payment of benefits as prescribed by the Workmen's Compensation Act constitute an election, which in equity and good conscience would prevent the plaintiff from maintaining the present action?

(h) Was it not the duty of the Court to construe the

legal effect of the dealing of the parties under the written instruments, namely, insurance policies and drafts, which payments were made to the plaintiff?

(i) Assuming it was proper to submit these written documents to the jury as a mixed question of law and fact, was it not error for the Court to fail to instruct the jury to reduce pro tanto from any verdict the amount already received by plaintiff?

Throughout the brief where individual page numbers are referred to, the reference is to the reporter system, except with respect to Oregon cases where the page reference is to the Oregon report.

SPECIFICATION OF ERROR NO. I

Plaintiff as a matter of law assumed the risk and danger of being injured. Plaintiff's injury came about while he was using his own ordinary automobile jack and any risk and danger in so doing was incidental to his employment and was fully appreciated by the plaintiff (T. 185). (This point raised on motion for non-suit (T. 166) and for directed verdict (T. 27).)

AN EMPLOYEE AS A MATTER OF LAW ASSUMES ORDINARY RISK OF EMPLOYMENT.

Parker v. Norton, 143 Or. 165, 21 P. (2d) 790;

Freeman v. Wentworth & Irwin, Inc., 139 Or. 1, 7 P. (2d) 796 (1932);

Christie v. Great Northern Railway Co., 142 Or. 321, 20 P. (2d) 377 (1933);

Bevin v. Oregon-Washington R. & Nav. Co., 136 Or. 18; 298 P. 204; (1931); certiorari denied, 284 U. S. 639;

Ferretti v. Southern Pacific Co., 154 Or. 97; 57 P (2d) 1280 (1936);

Wheelock v. Freiwald, 66 F. (2d) 694;

Northwestern Pacific R. Co. v. Feilder, 52 F. (2d) 400;

Walker v. Ginsburg, 244 Mich, 568; 222 N. W. 192;

Thompson v. Pennsylvania Railroad Company, 88 F. (2d) 148;

ARGUMENT

Specific reference is made to the fact that no complaint was made in this instance for the reason that it is quite commonly urged by an injured workman in order to get around the assumption of risk doctrine that he had complained of the tool or appliance furnished to his employer that it was unsafe for use and that his employer agreed to remedy the same. However, in this case there is no pretense of anything of that sort. Plaintiff's testimony was that he did not take the jack furnished by his employer because it was too heavy for him to manage.

Plaintiff made no request to his employer or anyone else for a jack but testified that he customarily used the jack out of his car, an ordinary Ford jack. The facts are uncontroverted—based on plaintiff's own testimony, he assumed the risk as a matter of law.

The district Court in denying appellant's motion for a new trial after stating that his only serious doubt on the motion was with respect to the defense of assumption of risk, said:

> "The Oregon Supreme Court in several decisions has relaxed the rigors of the common law doctrine of the assumption of risk. The Oregon Court has referred to the doctrine as 'harsh'." (T. 31, 32)

The District Court cited no cases for this statement and no cases were cited during argument to show that the Oregon Supreme Court had relaxed the common law doctrine of assumption of risk nor that it is a harsh doctrine but on the contrary, cases decided by the Supreme Court of Oregon repeatedly hold as a matter of law that an employee assumes ordinary risk of employment.

The assumption of risk doctrine was applied in the recent case of *Ferretti v. Southern Pacific Co.,* and nothing mentioned about the rule being harsh or the common law relaxed—nor have we observed such statement in any cases.

This rule of law respecting the assumption of risk doctrine as stated by the Supreme Court of Oregon is practically universal.

The rule and definition of the rule has been restated and cited so frequently that the same definition has been practically universally applied. In common law actions the assumption of risk doctrine is still good law under the decisions of the Oregon Supreme Court. The 8th Circuit Court of Appeals in *Wheelock v. Freiwald,* 66 F. (2d) 694, page 698, uses the same definition:

> "The risks assumed by an employee are those ordinarily incident to the discharge of his duty in the particular employment, and also those not ordinarily so incident, but of which he has actual or constructive knowledge, with full appreciation of the danger that may flow therefrom."

Citing a Supreme Court of the United States decision and numerous Federal Court decisions including one from this circuit, namely, that of *Northwestern Pacific R. Co. v. Feilder,* (C.C.A. 9) 52 F. (2d) 400. It is submitted that it would be hard to find a rule of law that has been applied and defined more universally by the Courts. There is nothing harsh about the doctrine; an employer is not an insurer.

The jack which plaintiff was using was an ordinary Ford jack that comes with a Ford car. It goes without

saying that there must be a million of them in use or that have been in use. They work on the very simple principle of leverage. By pushing the handle down, leverage occurs that will jack the car up in small stages at a time. Plaintiff's contention is that his employer failed to furnish a safe jack.

The Court should have held that plaintiff assumed the risk as a matter of law under the authority of *Freeman v. Wentworth & Irwin, Inc.,* 139 Or. 1, which is in point and is complete answer by the Supreme Court of Oregon contrary to plaintiff's contention. In that case a mechanic working as a specialist on truck transmissions, charged his employer with negligence in failing to furnish *safe tools.* The employee lost the sight of one eye through a particle of steel flying into it from a blow struck by him on a steel shaft with a ball peen hammer. Plaintiff claimed a copper hammer should have been furnished. The Court states, p. 9:

> "The plaintiff and some of his witnesses testified that a soft hammer made of copper, brass or babbit metal was not an ordinary hand tool but constituted a special tool. These witnesses testified that when hard steel is struck with a hammer made of soft metal no sparks are emitted. They added that employers of mechanics customarily keep such hammers or short strips of copper or brass in their tool rooms where the mechanics can obtain them upon request. The plaintiff swore that during his six years' employment by the defendant it had never furnished him with a hammer made of copper although, according to his testimony, he had asked it to do so. * * *
>
> "As we have said before, the duty to use due care

for its employees' safety did not require the defendant to supply the latest and most improved tools, but only such as were reasonably safe and of a kind generally used for that purpose. We know of no reason whatever why a short steel bar could not have been tapped into position by the use of a piece of oak; especially, do we know of no reason why this could not have been done by a workman who customarily used that method.

"But if we assume that the duty to provide the employees with reasonably safe tools could be satisfied with nothing but a copper hammer, and that such a tool was not an ordinary hand tool but was a special one, WE ARE SATISFIED THAT THE PLAINTIFF ASSUMED THE RISK WHICH RESULTED FROM ITS ABSENCE IN DEFENDANT'S SHOP. * * *"

"The plaintiff, by reason of his contract of employment is presumed to have agreed to assume all the risks ordinarily and obviously incident to the discharge of his duties. * * *

"It is apparent that the plaintiff had full knowledge of and appreciated the danger to himself which arose out of the defendant's alleged failure to keep in its tool room a copper hammer. Those two elements, as was said by Mr. Justice Burnett in Wintermute v. Oregon-Wash. R. & N. Co., supra, 'are the ingredients of assumption of risk.' Moreover, he neither asked for nor possessed an assurance that the defect would be remedied. We believe that it is obvious that the plaintiff assumed the risk resulting from the defendant's alleged default. In the carefully reasoned decisions announced in Golden v. Ellis, 104 Me. 177 (71 Atl. 649), and McDonald v. Standard Oil Co., 69 N. J. Law, 445 (55 Atl. 289), conclusions to like effect as our own were reached upon facts similar to those before us.

The above testimony and the foregoing principles of law induce the conclusion that the plaintiff failed to establish a cause of action against the defendant based upon common law negligence."

The assumption of risk doctrine was again applied by the Supreme Court of Oregon in reversing a judgment for plaintiff in the case of *Parker v. Norton,* 143 Or. 165 (21 P. (2d) 790) and the Court states, p. 173:

> "The work in which plaintiff was engaged was simple in character and any dangers involved were open and obvious. It is not the duty of the master to point out dangers readily ascertainable by the servant himself if he makes ordinarily careful use of such knowledge, experience and judgment as he possesses: Labatt's Master & Servant, Sec. 1144. As stated in 18 R. C. L. 569: * * *
>
> "In Wike v. O. W. R. & N. Co., 83 Or. 678 (163 P. 825), a carpenter was injured while placing asbestos lagging on the boiler of an engine. In commenting on an instruction relative to the duty of the defendant to warn the plaintiff, the court said:
>
> " 'Furthermore, the work was simple, well within the comprehension of any man who had had a half day's experience at it, as one of the witnesses testified. The only danger incident to the work which counsel for plaintiff has called to our attention is the tendency of wire to spring unless it is attached or straightened. Plaintiff must have understood this tendency as well as anyone. The master is under no obligation to warn the servant under such circumstances; * * *' Citing numerous authorities in support of the text.
>
> "Also see Magone v. Portland Mfg. Co., 51 Or. 21 (93 P. 450)." * * *

Also citing from the Case of *Walker v. Ginsburg,* 244 Mich. 568 (222 N. W. 192); the following language:

"That plaintiff might fall, and that the bar might slip, were dangers so obvious that defendants had no duty to warn of them."

The situation is analagous to one considered by the 6th Circuit Court of Appeals in the case of *Thompson v. Pennsylvania Railroad Company,* 88 F. (2d) 148, in which case the plaintiff brought an action for damages against his employer based upon

"negligence of his employer in failing to furnish him with *proper tools* for the performance of the work upon which he was engaged, * * *"

It appears that on the day of the accident, the employee was

"engaged in turning a main engine driving rod by means of a steel bar inserted into one of the bearings of the rod. His explanation of the accident is that the bar slipped from the bearing and caused him to be thrown violently to the floor."

In addition to the steel bar pin which the injured workman was using

"there was also available a chain hoist, the use of which was optional, although the plaintiff testified that at the time of the accident the chain hoist was not in position where it could be safely employed to turn the rod upon which he was engaged."

It was the contention of the injured workman that a wooden pole with a different length handle should have been used, that he had asked the foreman where the wooden pole handles were and was told that they used a steel pin bar and that he was to use it. He again asked the foreman whether he was going to get a wooden bar and was told "No, we break too many" and that "other men use a steel pin bar and you go ahead and use it." And later, when he asked for a wooden pole, he was told "forget it." The Court sets forth the following facts, P. 150:

> "On the morning of the accident, finding it difficult to turn the rod, he asked a fellow workman to aid him, and, while they were both pulling on the pin bar inserted in the bearing, the foreman came to him and said: 'This is a one man job. If you can't do the work alone go to the office and get your time.' He then continued the work alone.
>
> "The defense to the action below was a general denial and the affirmative defense of assumption of risk in the use of a simple tool, and election by the appellant to use pin bar rather than the chain hoist. Ruling upon the motion for directed verdict at the conclusion of all the evidence, the District Judge, finding no question to exist as to realization of real or fancied danger by the appellant in the use of the steel bar, and in reliance upon our decision in Hallstein v. Pennsylvania R. Co., 30 F (2d) 594, granted the motion on the ground that the appellant had assumed the risk incurred in the use of the tool.
>
> Before reaching any question of assumption of risk, however, the primary question is whether there has been actionable negligence on the part of the defendant, and this, of course, involves not only failure to exercise due care but the causative relation of such

failure to the injury. The burden of proof being upon the plaintiff to establish actionable negligence, the issue as to both its elements is clearly raised by a motion for peremptory instructions based upon the failure of the evidence to sustain a verdict. While all important facts were sharply in issue, we view the plaintiff's evidence, as under familiar rules we must, in the light most favorable to him. * * *"

The Court held in the first place that there was no actionable negligence shown, and then stated:

"Another consideration supports our conclusion. The pin bar is a lever, *and a lever is not only a simple tool* but indeed the simplest of all tools. Its function and manner of use is intuitively grasped even by those least accustomed to tools. It is, we think, incredible that the pin bar, inserted into the bearing hole as described, with force exerted thereon as indicated, could have slipped. It is the law of the lever, to be found in any elementary text-book on physics, that the moment of the effort is equal to the moment of the resistance. Theoretically therefore, the force operating to retain the bar in position equals the force exerted at the point of its application. A proper positioning of the lever would have effectively locked it against movement, and neither the bar, the resistance, nor the fulcrum failed. The irresistible inference therefor is that the bar was not properly inserted in the first instance or was permitted to get out of place between the appellant's first and second effort to turn the rod. Failing in credibility since necessary physical facts refute it, the evidence in this respect does not rise to the dignity of substantial evidence. Southern Railway Co. v. Walters, 284 U. S. 190, 52 S. Ct. 58, 76 L. Ed. 239; Ristucci v. Norfold & W. Ry. Co., 60 F. (2d) 28. 29 (C.C.A. 6)."

Comparing the facts in the instant case to those above, there is seen to be a close similarity. The charge of negligence is similar and the reasoning of the Court is equally applicable to our situation. Plaintiff in our case testified the car slipped off the jack. There is no light thrown on what caused the car to slip off the jack. The car may not have had the brakes set before the jacking operation was commenced, which could have caused the car to slip and certainly the car could have been prevented from slipping by the very simple and usual precaution of chocking the wheels. It is obvious that if the wheels had been properly blocked the car could not have slipped off the jack. It is equally obvious that the length of the jack handle had nothing to do with the car slipping off the jack

AN EMPLOYEE CREATING HIS OWN WORKING CONDITIONS ASSUMES THE RISK THEREOF.

Phillips v. Keltner, 124 S. W. (2d) 71; 276 Ky. 454;

City Timson v. Powers, 119 S. W. (2d) 145; Tex.;

Dinuhn v. Western N. Y. Water Co., 297 N.Y.S. 376; 252 App. Div. 51;

ARGUMENT

The law is that where working conditions become unsafe during the progress of work away from the employer's premises, there is no liability on part of the employer for failure to furnish a safe place to work.

An employee who chooses his own working conditions or makes his own place to work cannot complain that his employer was negligent in failing to furnish him a safe place in which to work. The plaintiff here entirely unknown to his employer, undertook the manner in which he was going to change the tire on this car. It may be that the car should have been moved to some other place to make it safe to work on. It may be that the wheels of the car should have been blocked to prevent it from rolling and slipping off the jack. These were matters that were up to the plaintiff himself to determine. It would be just as logical to allow the plaintiff to recover here as it would to allow him to recover if he stepped out from behind the car and was struck by another passing automobile, making the claim that his employer failed to furnish him with a safe place to work.

AN EMPLOYEE USING HIS OWN TOOLS, ASSUMES THE RISK THEREOF.

Hartz v. Shaefer, 154 Atl. 713; 303 Pa. 449 (1931);

Harkins v. Standard Sugar Refinery, 122 Mass. 400; (decided prior to N. E.);

Fellows v. Stevens, 170 Mich. 13; 132 N. W. 1047; 135 N. W. 823; 39 C. J. 621.

ARGUMENT

Another proposition of law under the facts in this case which absolutely defeats plaintiff's contention that de-

fendant here was negligent with respect to failing to furnish a safe and suitable jack is the fact that the plaintiff was using HIS OWN APPLIANCE. It is held that when an employee uses his own appliance or tools, he cannot claim any breach of duty on the part of his employer for failing to furnish safe ones or suitable ones.

In the case of *Hartz v. Shaefer,* supra, a guy rope while being used to hoist steel in place, broke. The Court says, p. 713:

> "The record shows that for the purposes of this particular work, the apparatus *belonged* to plaintiff's husband and others"

and holds as a matter of law, p. 713:

> "Where a servant furnishes the tools with which he works and they are or become defective or unsafe, occasioning an injury to the servant, the master cannot be held liable. Harkins v. Standard Sugar Refinery, 122 Mass. 400; Fellows v. Stevens, 170 Mich. 13, 132 N. W. 1047, 135 N. W. 823; 39 C. J. 621."

This is the same holding as made by the Supreme Court of Oregon in the *Freeman against Wentworth & Irwin, Inc.* case, supra. The same situation was present there. An employee using his own tool was claiming that his employer was negligent in failing to furnish him with

a safe one. The Court held that under common law doctrine even though the employee had complained to his employer about the tool and had been promised that another one would be obtained, nevertheless he would be charged with having assumed the risk, as a matter of law.

AN EMPLOYEE WHO HAS COMPARATIVE OR EQUAL KNOWLEDGE WITH HIS EMPLOYER IS HELD TO THE ASSUMPTION OF RISK DOCTRINE.

Hagermann v. Chapman Timber Co., 65 Or. 588; 133 P. 342;

Weeklund v. Southern Oregon Co., 20 Or. 591; 27 P. 260;

McEachin v. Yarborough, 74 S. W. (2d) 228; 189 Ark. 434 (1934);

Owen v. Elliot Hospital, 136 Atl. 133; 82 N. H. 497 (1927).

ARGUMENT

Another proposition of law which prevents the plaintiff from recovering herein is that of comparative knowledge.

It is held that where a servant's knowledge of defects in appliances and of the dangers incident thereto, is equal

to that of the master, that he assumes the risk and cannot recover.

This rule of comparative knowledge is the law in the State of Oregon. In the case of *John Weeklund v. The Southern Oregon Company* this doctrine was upheld by the Court reversing a judgment which plaintiff had obtained in the lower Court. The Court held (headnote 2):

> "Knowledge of Servant.—Where the plaintiff assisted in the construction of the chute for moving large timbers, and had as complete knowledge of its sufficiency for the purpose for which it was constructed as the defendant, and received an injury in the moving of the timbers down said chute, defendant is not responsible on account of its alleged unsuitableness for the purpose for which it was used."

This rule was again followed by the Supreme Court of Oregon in the case of *Hagermann v. Chapman Timber Company* where again the Court reversed a judgment obtained by the plaintiff on the grounds that the employee was as well aware of the danger as was his employer (Point 6) and this is still good law in the State of Oregon.

In *McEachin v. Yarborough,* supra, the Court states, p. 229:

> "It is a fundamental rule in the law of negligence that liability exists when the perils of the employment are known to the employer but not to the

employee, and NO LIABILITY IS INCURRED WHEN THE EMPLOYEE'S KNOWLEDGE EQUALS OR SURPASSES THAT OF THE EMPLOYER. 18 R. C. L., p. 548; Arkansas Smokeless Coal Co. v. Pippins, 92 Ark. 138, 122 S. W. 113, 19 Ann. Cas. 861. The uncontradicted testimony here shows that the employer had no superior knowledge to that of employee in reference to the nature of the stone being used, therefore had no duty to perform the neglect of which would create liability." *Owen v. Elliott Hospital,* 136 Atl. 133, p. 134:

"The cases have uniformly enforced the assumption of risk rule when the servant's knowledge of the danger is equal to, or greater than, the master's. Ahern v. Amoskeag Mfg. Co., 75 N. H. 99, 102, 71 A. 213. 21 L. R. A. (N.S.) 89, and cases cited: Fontaine v. Johnson Lumber Co., 76 N. H. 163, 80 A. 338; Zajac v. Amoskeag Mfg. Co., 81 N. H. 257, 262, 124 A. 792; Hood v. Consolidation Coal Co., 82 N. H. 75, 129 A. 490. 'It cannot reasonably be found that of two persons of equal knowledge and of equal ability to appreciate and understand a danger, one is in fault for not apprehending the danger and the other is not.' Ahern v. Amoskeag Mfg. Co., supra, page 102 (71 A. 215)."

This doctrine of comparative knowledge or equal knowledge would appear to be applicable in the instant case. Plaintiff himself knew about his own jack and certainly he knew as much about it as the defendant. There is no evidence that the defendant knew anything about the plaintiff's jack. Moreover the plaintiff knew what

the conditions were under which he was working. He knew the condition his back was in and what he could do and could not do with respect to crawling in and around and under cars. He had been working for defendant doing this type of work for more than a year prior to the time the accident occurred. He testified that he used his own jack in going off the lot and changing tires and that he would go off the lot to change tires on other cars averaging upward of four times a week. (T. 41, T. 99). Plaintiff knew as well as defendant would know that in using his jack that if the jack was set in an uneven place or if there was some other apparent reason why the automobile might move and slip off the jack that this could all be prevented by blocking the wheels of the car or the brakes could be set on the car to keep it from moving so that it couldn't slip off the jack. The plaintiff was working at this task alone. The defendant wasn't present, did not know what the conditions were. Plaintiff made his own conditions under which he was going to work. The plaintiff had knowledge of these conditions; the defendant did not, and under the circumstances it is submitted that the plaintiff assumed the risk as a matter of law.

IF PLAINTIFF UNDERTOOK WORK BEYOND HIS PHYSICAL CAPACITIES HE IS NOT ENTITLED TO RECOVER.

ARGUMENT

A man himself knows best what he is capable of doing. His employer is not liable if a workman undertakes work beyond his physical capacity.

Ferretti v. Southern Pacific Co., 154 Or. 97. An action in which plaintiff, an injured employee, sought damages against his employer. Plaintiff had sustained a broken arm in a prior injury and claimed his employer was negligent in requiring him, before his injured arm had regained its strength, to do work beyond his physical capacity. The Court states, P. 101, 102, 105:

> "Plaintiff claims that as a result of being ordered and directed to do this work above mentioned, in his physical condition, his right arm was 'badly twisted, displaced and forced back', and that he is permanently injured. There is some evidence tending to show permanent injury. * * *
>
> "No contention is made by counsel for plaintiff that recovery could be had under the common-law rules of negligence. It is clear that plaintiff fully understood and appreciated the risks incident to his employment. He, as well if not better than his employer, knew whether the work in which he was engaged was beyond his physical capacity. See Ehrenberger v. Chicago R. I. & P. Ry. Co., 182 Iowa 1339 (166 N. W. 735, 10 A. L. R. 1388); Worlds v. Georgia R. Co., 99 Ga. 283 (25 S. E. 646); Leitner v. Grieb, 104 Mo. App. 173 (77S.W.764), and Williams v. Kentucky River Power Co., 179 Ky. 577 (200 S. W. 946, 10 A. L. R. 1396), wherein recovery was denied in personal injury actions based upon the alleged negligence of the employer in ordering and directing an employee to do work beyond his known physical capacity. * * *

"Since the act, in our opinion, has no application and THERE PLAINLY COULD BE NO RECOVERY UNDER THE COMMON LAW RULES OF NEGLIGENCE, the defendants were entitled to a directed verdict."

SPECIFICATION OF ERROR NO. II

AN EMPLOYEE AS A MATTER OF LAW ASSUMES THE RISK OF USING SIMPLE OR ORDINARY TOOLS. Plaintiff having been injured while using an ordinary simple tool, the Court should have ruled that he assumes the risk as a matter of law and the Court further erred in instructing the Jury that defendant had duty of furnishing the plaintiff with safe and adequate tools for tire changing. (This point raised on motion for non-suit (T. 166) and for directed verdict (T. 27).

Spain v. Powell, 90 F. (2d) 580;

Middleton v. National Box Co., 38 F. (2d) 89;

Middleton v. Faulkner, 178 So. 583; 180 Miss. 737;

Williams v. Terminal R. Ass'n., 98 S. W. (2d) 651; 339 Mo. 594; Cert. denied 300 U. S. 669.

ARGUMENT

The rule is well established that an employer has no duty or liability to an employee for failure to furnish safe, ordinary appliances or tools. This under the so-

called simple tool doctrine and the theory is that an employee is in as good a position to know whether the tool is safe as is his employer. The reason for the so-called safety tool rule, as pointed out by the Court, is the use of modern, dangerous and complicated machinery and equipment. It is submitted that the Court erred in failing to rule as a matter of law that plaintiff had assumed the risk of using simple tools and further intensified the error by instructing the Jury the defendant had the absolute duty of furnishing the plaintiff with safe tools. The Court instructed the Jury (T. 169, 170):

> "Now, every employer has the duty of providing reasonably safe and adequate tools for his employees to work with, and that is the charge the plaintiff has made against the defendant in this case, that reasonably safe and adequate tools were not provided for this tire changing. Now, that is for you to decide, whether the defendant's conduct did not come up to that standard of its obligation as an employer. If you are satisfied by a preponderance of the evidence that the defendant did not provide reasonably safe and adequate tools for this work and that the plaintiff was injured as he claims, and that the failure to provide these tools was the proximate cause of his injury, which means the direct cause, then the plaintiff has established his claim as against the defendant."

If an automobile jack which comes as standard equipment with every Ford car is an ordinary or simple appli-

ance, then obviously the Court should have held as a matter law that plaintiff assumed the risk and the above instruction was erroneous and tended to intensify the error.

The case got cluttered up with testimony as to the latest and most modern type of equipment. Such testimony would be inadmissible in an action to recover at common law. This testimony, however, was allowed to come in prior to the Court's ruling that the Employer's Liability Act did not apply and that the case would proceed as a common law action. Plaintiff testified there was a later type jack (a screw type) that should have been furnished (T. 55). Our Supreme Court of Oregon has held that an employer has no duty under the common law to furnish an employee with the latest and most modern equipment.

Freeman v. Wentworth & Irwin, Inc., 139 Or. 1, 11:

> "As we have said before, the duty to use due care for its employee's safety did not require the defendant to supply the latest and most improved tools, * * *"

All the testimony concerning the latest and most modern equipment and plaintiff's testimony that a screw type jack was later and more modern and should have been furnished was misleading and confusing to the Jury especially in view of the Court's foregoing instruction.

This instruction imposed upon the defendant obligations way beyond the duties imposed by common law and prevented the defendant from having a fair trial.

The Courts have repeatedly held that ordinary appliances and tools that are in general use fall within the simple tool doctrine. Where there is nothing complicated about the appliances or tools, an employee is at common law charged with assuming the risk of using them. There is no duty on the part of the employer to see that such tools are safe. We cite a few cases which illustrate the rule and they are cases involving larger and more complicated tools than the Ford jack that was being used in the instant case. The cases, however, were selected because of their analogy in the principle of leverage.

Spain v. Powell, 90 F. (2d) 580 (4 C.C.A. 1937), an action for personal injuries in which plaintiff was engaged in making repairs to a refrigerator car. One of the wheels of the car had developed a flat surface and it became necessary to remove a pair of wheels of which it was a member from the truck beneath the body of the car. In order to remove the wheels it was necessary to take out the springs by hand and to accomplish that the bolster had to be raised to relieve the springs of its weight. The Court, p. 581, says:

> "For this purpose a chain is placed around the bolster at each end, a lever six feet long is inserted between the chain and the bolster, and the side of the

truck is used as a fulcrum. A helper sits on the free end of the lever, thereby lifting the bolster from the springs and enabling the car repairer to remove them. After the wheels have been removed and replaced, the bolster is again lifted to permit the replacement of the springs. While the plaintiff in the pending case was engaged at this point of the operation in replacing the springs on one end of the truck, the chain gave way and the bolster fell upon his right hand and caused the injury.

"The gist of the action is that the plaintiff was not furnished with a suitable chain for the work. * * *

"Even if we assume, in the absence of a showing to the contrary, that it was the mechanical device and not the human agencies which failed, the plaintiff is no better off. He was qualified by long experience to understand the true nature of his work and he was dealing with a very simple tool or device. The rule in the case of simple tools was stated by this court in Newbern v. Great Atlantic & Pacific Tea Co., 68 F. (2d) 523, 525, 91 A.L.R. 781, as follows:

"It is well settled that, while it is the duty of the master, in exercise of reasonable care for the safety of the employee, to see that machinery and appliances which may cause injury to him are in reasonably safe condition, this duty does not ordinarily exist with respect to simple tools from the use of which no danger is reasonably to be apprehended or as to which the employee is in a better position than the master to discover defects. 39 C. J. 342, 419; 18 R.C.L. 563; Kilday v. Jahncke Dry Dock & Ship Repair Co. (C.C. A. 3) 171 F. 394; Middleton v. National Box Co. (D. C.) 38 F. (2d) 89; Taylor v. A.C.L.R. Co., 203 N. C. 218, 165 S. E. 357; Cole v. S. A. L. Ry. Co., 199 N. C. 389, 154 S. E. 682; Martin v. Highland Park Mfg. Co., 128 N.C. 264, 38 S. E. 876, 83 Am. St. Rep. 671; and see notes in 1 L.R.A. (N.S.) 949; 13 L.R.A. (N.S.) 668; 30 L.R.A. (N.S.) 800; 40 L.R.

A. (N.S.) 832; 51 L.R.A. (N.S.) 337; L.R.A. 1918 D, 1141. This is true, not because the employee assumes the risk of injury from defects in such tools, but because the possibility of injury is so remote as not to impose upon the master the duty of seeing that they are free from defects in the first instance or of inspecting them thereafter. The fact that the employee has better opportunity than the master to judge of the defects of such tools, that no inspection is necessary to discover such defects, and that no danger is to be apprehended which the employee cannot guard himself against, renders it unnecessary in ordinary cases that the master exercise with respect to simple tools the care that the law requires with respect to more complicated machinery. With respect to simple tools, ordinarily the master is not relieved of responsibility because the servant assumes the risk, but the servant assumes the risk because the master is relieved of responsibility, or what is probably a more accurate statement, the same circumstances which establish assumption of risk on the part of the servant show that there is no duty on the part of the master. Assumption of risk by the servant does not necessarily imply negligence on the part of the master."

The same rule is announced in *Middleton v. National Box Co.,* 38 F. (2d) 89, (D.C., S.D. Miss. 1930) p. 90, the Court:

"They hold that in the case of simple tools the master, as a matter of law, is relieved of the ordinary duty of furnishing safe tools and appliances to the servant, and of inspecting and repairing the same when furnished.

"In Wausau Southern Lumber Company v. Cooley, 130 Miss. 333-341, 94 So. 228, 229, the court says: 'A careful examination of the law upon the subject convinces us that the master is not under any duty to the servant as to furnishing a safe tool in the case of such a simple tool as the one in the case at bar, (an axe) and, being under no duty, there can be no breach of duty and hence no liability resulting therefrom.'

"Bear Creek Mill Co. v. Fountain, 130 Miss. 436, 94 So. 230 231, was to the same effect, the court saying: 'We think on the simple tool proposition this case comes within the authorities reviewed and announced in the opinion this day handed down in the case of Wausau Southern Lumber Co. v. Cooley, 130 Miss. 333, 94 So. 228.'

"In the latter case of Allen Gravel Co. v. Yarbrough, 133 Miss. 652, 98 So. 117, 118, the court reaffirmed the holding in Wausau Southern Lumber Company v. Cooley, supra, and quoted with approval from that case as follows: 'In order to predicate liability in the suit against the master for personal injury, there must be some negligence upon the part of the master which causes the injury. The master is not under duty, as regards a mere simple tool, to furnish a servant with a safe tool; the servant's knowledge and judgment in such case being equal to that of the master.'"

And again the Supreme Court of Mississippi in the case of *Middleton v. Faulkner,* at page 584, states:

"But as these modern rules of obligation on the part of the master arose and became definitely estab-

lished, they were made to apply only to the situations or conditions which furnished the reasons therefor, and therefore were not extended back to the simpler tools of earlier days and those similar thereto. Thus the common law of today, as declared in numerous decisions of this court, is that ordinarily the master is under no obligation of care in regard to the safety of simple tools, either in the furnishing thereof or in their maintenance and repair."
Citing numerous authorities.

And again in the case of *Williams v. Terminal R. Ass'n* at page 654:

"Pryor v. Williams, 254 U. S. 43, 41 S. Ct. 36, 65 L. Ed. 120, reversing Williams v. Pryor, 272 Mo. 613, 200 S. W. 53. Many other cases have made a similar application to that made in the Kuhn and Williams Cases of the rule of assumption of risk in cases of eye injuries caused by flying objects, sustained by section men WORKING WITH SIMPLE TOOLS AT USUAL TASKS OF TRACK REPAIR WORK. Harper v. Chicago, R. I. & P. R. Co., 138 Kan. 782, 28 P. (2d) 972; Jones v. Southern Ry., 175 Ky. 455, 194 S. W. 558; York v. Rockcastle River R. Co., 215 Ky. 11, 284 S. W. 79; Louisville & N. R. Co. v. Russell, 164 Miss. 529, 144 So. 478; Texas & P. R. Co. v. Perkins (Tex. Com-App.) 48 S. W. (2d) 249; Guitron v. Oregon Short Line R. Co., 62 Utah, 76, 217 P. 971; McGraw v. New York Cent. R. Co., 111 W. Va. 175, 161 S. E. 9; Karras v. Chicago & N. W. R. Co., 165 Wis. 578. 162 N. W. 923, L. R. A. 1917 E, 677."

It is submitted that the District Court's instruction in the instant case was erroneous and did not state the law and even assuming it was a question of fact to be determined by the Jury whether this was or was not a simple tool, the instruction was wrong. The instruction took this very fundamental proposition away from the Jury as a matter of law and had the effect of stating that the jack was not a simple tool or appliance but as a matter of law was a dangerous appliance. Such an instruction virtually imposed upon the defendant a liability of insuring the plaintiff's safety. The instructions were applicable only to dangerous machinery and equipment.

SPECIFICATION OF ERROR NO. III

Plaintiff made demand and elected to take compensation payments. He has been compensated once for the same injury and released his claim. (This point raised on motion for directed verdict (T.27) also Court instructions (T. 176).)

> (Mr. Powers) "And I think we should have an instruction in this case along the lines requested in defendant's requested instructions that a man is only entitled to be compensated for his injuries only once; he isn't entitled to a double compensation for the same injuries." * * *

PLAINTIFF MADE AN ELECTION TO AND DID ACCEPT THE COMPENSATION BENEFITS AS PROVIDED IN THE INSURANCE POLICY WHICH WAS THE EXERCISE OF A REMEDY INCONSISTENT WITH PRESENT ACTION.

1935 *Oregon Code Supplement,* Sec. 49-1814;

King v. Union Oil Co., 144 Or. 655, 24 Pac. (2) 345;

Anderson v. Hartford Accident and Indemnity Co., 152 Or. 505; 53 P. (2) 710; 54 P. (2) 1212;

Roles Shingle Co. v. Bergerson, 142 Or. 131 (19 P. (2d) 94);

Holmes v. Henry Jenning & Sons, 7 F. (2d) 231;

Robb v. Vos, 155 U. S. 13;

Williston on Contracts, Vol. 3, R. Ed., Sec. 684, 686.

ARGUMENT

Plaintiff accepted the benefits under the insurance contract and it is too late for him to now say that he didn't understand that he was waiving his action for damages against his employer. There is nothing harsh or inequitable about the terms of the insurance policy. It provides the insurance company will voluntarily pay to any injured workman willing to accept the same, all pay-

ments and benefits as prescribed by the State Workmen's Compensation Act. In other words, the plaintiff is in the same position as any other injured workman who happens to be under the act except such other injured workman would not have right of election. He would have to take the benefits of the act, whereas the plaintiff, after he was injured, had two alternative remedies. He could bring an action in tort against his employer or accept the benefits under this insurance contract. Plaintiff did not have the right to do both. He could only do one or the other.

The Oregon Workmen's Compensation Act appears in the 1935 Oregon Code Supplement. Section 49-1814, a part thereof, provides that compensation paid under the act to an injured employee and received by him "shall be in lieu of all claims against his employer on account of such injury." This provision of the law is incorporated in the compensation endorsement on the insurance policy (T. 157):

> "It is agreed that all of the provisions of such Workmen's Compensation Law shall be and remain a part of this contract as fully and completely as if written herein as a measure of the compensation or other benefits for any personal injury or death covered by this policy * * *
>
> "This is a contract between the Company and this employer for the benefit of any employee covered by this policy who receives an injury for which he would been entitled to compensation under the provisions of such law if this employer was subject thereto. It is

the purpose hereof to provide voluntarily such compensation to such injured employees as will accept it in lieu of all other claims or demands because of such injury. * * *"

It was held by the Supreme Court of Oregon in *Roles Shingle Co. v. Bergerson,* that a (Headnote 2)

"Workman may by contract substitute remedy of compensation Act for common-law remedy for injuries received in course of his employment."

And it has been repeatedly held in this jurisdiction that accepting compensation payments extinguishes the common-law right on the theory of election between two inconsistent remedies.

The Supreme Court of Oregon in the case of *King v. Union Oil Company,* held that a minor who had received compensation under the State Act (although uninformed as to the legal effect in doing so) constituted an election which would bar a common law action against a third party. The Court cites the Federal cases referred to above as in harmony with this doctrine, stating p. 666:

"Our attention has not been called to any statute making it unlawful for the county to employ this boy at the season of the year when the accident occurred in the work he was then doing. While he was only ten years of age, the statute made him sui juris for the

purposes of the act and presumably, in making his claim for compensation and in accepting payment thereof, his father was acting as his natural guardian. It is a well settled rule that when a party has two remedies inconsistent with each other, any act, done by him with a knowledge of his rights and of the facts, determines his election of the remedy. Robb v. Vos, 155 U. S. 13.

"This court has decided numerous cases where small payments had been made under the act by the commission which had afterward been repaid and it was held that the right to elect had not been lost. In none of these cases, however, were the facts proven as conclusive upon that question as in the instant case. Hicks v. Peninsula Lumber Co., supra, is one of such cases. In this connection it must be remembered that, when an election has once been made to take under the act, the cause of action automatically inures to the state and no longer abides with the injured workman and thereafter the state alone can sue and that for the benefit of the accident fund. See Holmes v. Henry Jenning & Sons, supra. Hence, we hold that, if plaintiff ever had the right to make the election, such right did not exist after he *had received full compensation* under the statute.

"For these reasons, the judgment must be reversed * * *"

As was said by Judge Wolverton in *Holmes v. Henry Jenning & Sons,* 7 Fed. (2d) 231, after holding that where an injured man had accepted part compensation and then commenced an action against a third party that this constituted an election, p. 234:

"I come the more readily to this conclusion, knowing that plaintiff will recover his compensation from the commission under the act.

"It is urged that plaintiff's state of mind was such that he did not fully realize what he was doing when he made the application for compensation. The contention, however, is not sustained by the evidence, and no mention is made of it in the pleadings, and no issue is presented involving such a controversy. *I have but to say, further, that I regard the Workmen's Compensation Act a wholesome and humane piece of legislation, and its letter and spirit should be maintained in all applicable cases.*"

So in this case, the plaintiff has not been left out in the cold and the plaintiff has not received anything but fair treatment. If the plaintiff has any permanent partial disability, he would have a right under the insurance policy to make a claim and have the matter determined by medical arbitration and if such disability exist to be compensated for it under the terms of the policy.

As stated by Williston, election does not depend on intention so here, even though the plaintiff may not have intended to surrender his right of action against his employer, he could not, after exercising an alternative remedy by accepting benefits under the insurance contract, then turn around and sue his employer, no matter what his intention was.

Williston on Contracts, Vol. 3, R. Ed., Section 684, p. 1971:

> "Election does not depend on intention.—In a correct definition of waiver, wherever that word is used in the sense of election, the requisite of even apparent intention to surrender a right is absent. The law simply does not permit a party in the case supposed to exercise two alternative or inconsistent rights or remedies."

And again *Williston on Contracts,* Vol. 3, Sec. 686.

> "What manifestation of election is final.—The question when election of one of two inconsistent courses has gone so far as to preclude subsequent choice of the second course when the first proves ineffectual is raised in several classes of cases. If the change from the first alternative to the second involves any substantial injury to the other party, clearly the change ought not to be permitted, * * *"

There was an offer and acceptance here between the insurance company and plaintiff. Plaintiff accepting compensation payments and other benefits over a long period of time manifests clearly his intention to take under the contract and he will not now be allowed to say that he had a mistaken idea about the matter and that because

of a silient mental reservation he did not intend to relinquish his right of action against his employer. Such assertions of silient mental reservations have many times been put forward but they are not allowed by the courts to relieve a party from his contract. The case of *Anderson v. Hartford A. & I. Co.* upholds the provision of an identical insurance contract under which benefits were paid to an injured employee.

COMPENSATION PAYMENTS AS MEASURED AND PRESCRIBED BY THE STATE ACT CONSTITUTE SATISFACTION AND TO ALLOW FURTHER RECOVERY FOR SAME INJURY VIOLATES RULE AGAINST DOUBLE COMPENSATION.

Williams v. Dale, 139 Or. 105, 108 (8 P. (2d) 578);

McDonough v. National Hosp. Ass'n., 134 Or. 451 (294 P. 351);

Matheny v. Edwards Ice M. & S. Co., 39 F. (2d) 70;

Holmes v. Henry Jenning & Sons, 7 F. (2d) 231;

Williston on Contracts, Vol. 6 R. Ed., Sec. 1849; 1855;

Williston on Contracts, Vol. 5 R. Ed., Sec. 1536;

O'Donnell v. Clinton, 145 Mass. 461, (14 N. E. 747);

ARGUMENT

The benefits provided for by the Workmen's Compensation Law of Oregon constitute satisfaction, *Williams v. Dale,* p. 108:

> "It is one of the main objects of the Workmen's Compensation Law that suitable, speedy relief may be rendered to an employee who, together with his employer, comes within its provisions, and although the compensation may not, in all cases, be as great as would be recovered in cases of negligence, nevertheless the amounts provided for, when awarded, *take the place of and are in full settlement for such injuries.*"

Again the Supreme Court of Oregon in considering an action by an employee who had already received compensation under the State Act, held that an injured person is entitled to only one satisfaction and that the amount the injured person received, or was entitled to receive as prescribed by said act, constituted satisfaction. *McDonough v. National Hospital Association,* p. 455:

> "The general rule is that when a plaintiff has accepted satisfaction in full for an injury done him, from whatever source it may come, he is so far affected in equity and good conscience that the law will not permit him to recover again for the same damages."

Both of the Federal cases cited stand for the proposition that to allow an injured employee, after he has been paid compensation under the State Act, to proceed with

an action for negligence against a third party, would permit the employee to recover double compensation for the same injury and the amounts received under the State Act constitute satisfaction.

Williston on Contracts, Vol. 6 R. Ed., Section 1849, states the same proposition in these words:

> "* * * The acceptance of property in satisfaction necessarily imports an agreement never to enforce the original obligation, and covenants to forbear perpetually were early given effect as a defense, even by courts of law. The reason sometimes given is that such a covenant amounts to a release. The more accurate reason, however, and that generally given in the books, is that circuity of action is thereby avoided."

Plaintiff had no right to accept these drafts and cash them unless he intended to comply with the plain conditions on the face of them. The plaintiff is a well educated young man. The record shows that he is a high school graduate and has had considerable business experience. His claim up to the time he made his arrangements with the insurance company and started cashing the compensation drafts was an unliquidated claim and the drafts constituted an account stated and he would be barred from any further recovery for the same matter after accepting and cashing these drafts. *Williston on Contracts,* Vol. 6 R. Ed., Section 1855, has this to say

with reference to the acceptance of a draft or check with conditions written thereon respecting an unliquidated claim:

> "* * * So if the debtor laid down the check and departed, saying, 'If this is taken it is full satisfaction,' (and similarly if the debtor sends the check with a like notice), and the creditor takes it, saying nothing, his taking will be equivalent to an expression of assent to the offer, whatever his mental intent; and if he indicate by some act or word, not brought home to the debtor at the time that he takes the check, that his intention is not to treat the debt as satisfied, he should still be regarded as assenting to the terms of the debtor's offer, for under the circumstances the debtor has reason to suppose that the taking of the check is manifestation of assent."

Citing numerous authorities.

Plaintiff acts in receiving and cashing these drafts with the conditions stated on their face constituted an accord and satisfaction. If plaintiff's contention that he did not understand that by receiving these payments and benefits that he was releasing his right to sue his employer, could be considered to be a mistake of fact rather than a mistake of law, plaintiff's outward actions and his repeated manifestations to proceed under the policy would estop him from making any such contention. If it should be considered that the plaintiff did not intend to

give his mental assent to release his claim against his employer, this would not be sufficient under the law to relieve him of his obligations under this contract because of his external acts. As was said by *Holmes, J., in O'Donnell v. Clinton,* 145 Mass. 461, 463; 14 N. E. 747, 751:

> Assent, in the sense of the law, is a matter of overt acts, not of inward unanimity in motives, design, or the interpretation of words."

And as said by Williston, Vol. 5 R. Ed., Section 1536:

> "* * * Under the guise of conclusive presumptions of mental assent from external acts, the law has been so built up that it can be now expressed accurately only by saying that the elements requisite for the formation of a contract are exclusively external."

The meaning of the words on the draft were clear and unmistakable. The plaintiff's external acts or overt acts as distinguished from his now claim mental assent indicated by everything that he did that he was accepting the benefits under the insurance contract and that he intended accepting the benefits under the insurance contract instead of prosecuting any action at law against his employer.

PLAINTIFF EXCHANGED HIS TORT ACTION FOR ONE IN CONTRACT AND THIS CONSTITUTES SATISFACION.

MacDonald v. Hornblower & Weeks, 268 Mich. 626, 256 N. W. 572;

Burleson v. Langdon, 174 Minn. 264; 219 N. W. 155;

Gibbs v. Redman Fireproof Storage Co., 68 Utah 298; 249 P. 1032;

Hunt, Accord & Satisfaction, Sec. 2, p. 5;

ARGUMENT

These cases dealt generally with facts where an injured person had received an agreement to pay from a tort feasor. The payments had not been completed and the Courts hold the tort action had been exchanged for one in contract and this constituted satisfaction. This rule is stated in *Hunt, Accord & Satisfaction,* Sec. 2, p. 5.

PLAINTIFF HAVING CHANGED HIS CAUSE OF ACTION FROM ONE IN TORT TO ONE IN CONTRACT, IN THE ABSENCE OF PLEADING AND PROVING FRAUD OR MISTAKE HE WILL NOT BE RELIEVED OF THE OBLIGATIONS IMPOSED UPON HIM UNDER THE CONTRACT.

Kight v. Orchard-Hays, 128 Or. 668, 275 P. 682.

Williams v. Adams, 91 S. W. (2d) 951 (Tex.) (1936);

Upton v. Tribilcock, 91 U. S. 45, 50 (23 L. Ed. 203).

ARGUMENT

The law does not allow an injured workman to accept the fruits of a bargain and then turn around and bring another action for the same injuries. The plaintiff here is saying that he did not know the legal effects of the contract under which he was receiving payments. Clearly under the following Oregon decision a person cannot relieve himself from the obligation of a contract by such a contention. As was stated by the Court in *Kight v. Orchard-Hays,* 128 Or. 668, 672:

> "They sought to introduce evidence to the effect that defendants did not read the contract which they signed. It is elementary law in this state that defendants are bound by their contract and are not allowed to contradict a written contract by oral testimony or to say that they did not know the contents thereof without pleading and proving fraud."

In the case of *Williams v. Adams,* the Court states at page 953:

> "In order to recover, the plaintiffs had the burden of showing a right to a cancellation of the written contract of settlement as a condition precedent to a recovery of the damages sought on the merits."

In the case of *Upton v. Tribilcock,* the Court states:

> "It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they were written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission."

It is submitted that in the absence of any pleading and evidence of fraud or mistake it was error for the Court to submit the case to the Jury.

INJURED PERSON NOT ALLOWED TO SPLIT HIS DEMAND OR CAUSE OF ACTION.

Ingram v. Carlton Lumber Co., 77 Or. 633 (152 P. 256);

Myhra v. Park, 258 N. W. 515 (193 Minn. 290);

Kidd v. Hillman, 58 P. (2d) 662 (14 Cal. App. (2) 596);

Globe & Rutgers Fire Co. v. Cleveland, 34 S. W. (2d) 1059, 1060 (162 Tenn. 83);

Ierardi v. Farmers Trust Co., 151 Atl. 822 (Del.)

Williston on Contracts, Sec. 686;
34 C. J. 833;

Hunt on Accord and Satisfaction, Sec. 42.

ARGUMENT

The Oregon case of *Ingram v. Carlton Lumber Co.* on this question is squarely in point with the present case. There an injured workman brought action against his employer. He had been paid $150 and had executed an informal release. He did not plead fraud or misrepresentation. He claimed there, as is claimed here, that he thought he was only receiving his loss of wages. The Court says, p. 638:

> "The loss of time resulting from the injury, together with the attendant deprivation of wages, con-

stitutes an element of damage recoverable in an action of this sort. The plaintiff says he understood the paper in question to be a receipt for such prospective wages. Adopting his own construction of it, and still ALLOWING HIM TO PROSECUTE THIS CAUSE, NOTWITHSTANDING THE RELEASE, IS NOTHING LESS THAN PERMITTING HIM TO SPLIT HIS CAUSE OF ACTION.

"It is hornbook law that this is not allowed, and that all the elements of damage relied upon must be included in one complaint, to the end that there shall be but one recovery for the one tort."

Williston on Contracts, under the head of

"Splitting cause of action: Election of remedies, relation to, Section 686,"

considers splitting cause of action and election of remedies on the same footing and under the Section 686 which is indexed as "Splitting cause of action," makes the following statement:

"Where an injured employee has a choice between an action against the person responsible for the injury and compensation under a Workmen's Compensation Act, his filing claim and accepting payments under the Act constitutes an election. (12) citing Holmes v. Jennings & Son, 7 Fed. (2) 231; King v. Union Oil Co., 144 Or. 655; Salt Lake City v. Industrial Accident Comm. (Utah) 17 Pac. (2) 239."

And *34 C. J.* 833, states:

"Entire claim founded on single claim cannot be split."

Myhra v. Park, 258 N. W. 515: Stands for the proposition that all items of damage resulting from single tort form indivisible cause of action and must be included in one suit and further action cannot be maintained on any item voluntarily omitted in ABSENCE OF FRAUD on part of adversary or mutual mistake.

Kidd v. Hillman, 58 P. (2d) 662:

Holds that single cause of action cannot be split or divided and independent actions brought on each part.

Globe & Rutgers Fire v. Cleveland, 34 S. W. (2) 1059, 1060:

Declares that single tort can be the foundation for but ONE CLAIM for damages. * * * All damages which can by any possibility result from a single tort form an indivisible cause of action.

and again in

Ierardi v. Farmers Trust Co., 151 Atl. 822, it is ruled:

Wrong act of a negligent third person is single and indivisible and can give rise to but ONE LIABILITY.

The rule is well stated by Hunt on Accord and Satisfaction, Sec. 42, page 77, wherein, referring to a tort action, it is said:

"THE CAUSE OF ACTION IS SINGLE AND INDIVISIBLE. An accord and satisfaction by one enures to the benefit of all. BY MAKING THE CLAIM AND ACCEPTING COMPENSATION THEREFOR, all persons against whom an

action might be brought for such injury are released, whether the party with whom the compromise was made could have been legally held in an action for such damages or not."

SPECIFICATION OF ERROR NO. IV

IN FAILING TO HOLD THAT THE ENDORSEMENT OF THE CAMPENSATION DRAFTS AND RETAINING THE FRUITS OF THE CONTRACT CONSTITUTED A RELEASE OF PLAINTIFF'S CLAIM FOR HIS ALLEGED INJURY. (THIS POINT RAISED ON MOTION FOR DIRECTED VERDICT (T. 27).

Davis v. H. P. Cummings Construction Co., 129 Atl. 729; 82 N. H. 87;

Sunlight Coal Co. v. Floyd, 26 S. W. (2d) 530 (233 Ky. 702) (Ky. 1930);

Thornton v. Puget Sound P. & L.. 49 F. (2d) 347;

Otis v. Pennsylvania Co., 71 F. 136;

Hamilton v. St. Louis, K. & N. W. R. Co., 118 F. 92;

Williston on Contracts, Vol. 1, p. 294.

ARGUMENT

The rule is established in this Circuit that a person who has received settlement payment for personal injuries and has executed release cannot retain the fruits and

benefits of his contract and still avoid the effects of the release. The authorities on this subject are correlated in *Thornton v. Puget Sound P. & L.* First there must be a tender back of the payments received under the release contract and further in order to overcome the release or settlement contract there must be affirmatively alleged mistake or fraud. Under the new Federal Rules, this same requirement of affirmatively pleading mistake or fraud pertains. [Rule 9 (C)] Plaintiff plead neither fraud or mistake; nor did he tender back the fruits and benefits of the contract and under the above authorities, it is submitted the Court erred in failing to dismiss this action. The case of *Davis v. H. P. Cummings Construction Co.* is squarely in point. It involves an injured workman who had the right to take the benefits under his employer's insurance contract, which were measured by the State Workmen's Compensation Act, or to proceed with his common law remedy. The employee there, as in the present case, accepted periodic compensation payments. The Court held in the absence of his pleading or proving fraud or mistake, the receipt and acceptance of each one of the drafts for compensation payments was a bar to his action in which he was attempting to sue his employer, as here, for the same injuries.

> "The $15 paid the plaintiff weekly are described in each receipt as being the proportion of his weekly wages under the 'New Hampshire Workman's Com-

pensation Act.' The latter words are just above where the plaintiff signed his name. The plaintiff is barred from maintaining his action for negligence under the common law (Laws 1911, c. 163, Sec. 4; Watts v. Derry Shoe Co., 79 N. H. 299, 109 A. 837). unless, when he signed the release and receipts, he did not have sufficient mentality to transact business or they were obtained by fraud. The receipt and acceptance by the plaintiff of any one of the 17 payments made after the giving of the release would be sufficient to bar the plaintiff's present action. * * *"

And again in the case of *Sunlight Coal Co. v. Floyd,* decided by the Court of Appeals of Kentucky, 1930, 26 S. W. (2d) 530, it was stated by the Court at page 532:

"* * * Inasmuch as appellee had not only asserted a claim under the act, but had accepted compensation under its provisions, there is no escape from the conclusion that the facts were such as would have estopped him from suing at common law, even though he had proceeded before his cause of action was barred by limitation. Kentucky Statutes, Sec. 4882, Allen v. American Milling Co., 209 Ill. App. 73; Lang v. Brooklyn City R. Co., 217 App. Div. 501, 217 N. Y. S. 277; Davis v. H. P. Cummings Const. Co., 82 N. H. 87, 129 A. 729. * * *"

And again in the case of *Florida East Coast Ry. Co. v. Thompson,* (Florida 1927), 111 So. 525, which is a case where the plaintiff was making a similar contention to the one plaintiff is making here, namely, that he thought he was only getting his wages. The Court has this to say, p. 530:

"* * * Defendant did not owe him any wages, but if plaintiff genuinely thought the plaintiff was paying him his wages while he was in the hospital, the sum thereof would not have exceeded $210, yet plaintiff received and accepted $350. By plaintiff's own statement, he knew that part of said sum was 'for the benefit of your (plaintiff's) wife and children,' and hence was not wages."

This very pertinent remark by the Supreme Court of Florida that the plaintiff knew that part of what he was getting was not for wages applies just as forcefully to the plaintiff in the instant case. Because as the plaintiff in this case, while he stated on redirect examination that he thought he was just getting paid for his loss of wages, yet prior to that he had admitted and the record shows that he had made arrangements with the insurance company that his hospital and doctor bills were to be paid and the record shows that these bills were paid in a total sum amounting to over $500.00. In face of this it can be seen by the Court from the record that plaintiff contradicts his own statement, when he says he thought he was only being paid his loss of time.

The provisions of the insurance contract are quite similar to the provisions used by relief departments of railroads which provisions were interpreted by the courts years ago to be of real benefit to an injured employee and

not against public policy. An early leading case concerning one of the railroad contracts is *Otis v. Pennsylvania Co.,* decided 1896, 71 F. 136, in which case it was stated by the Court, p. 138:

> "By the contract he was given an election either to receive the benefits stipulated for, or to waive his right to the benefits, and pursue his remedy at law. He voluntarily agreed that, when an injury happened to him, he would then determine whether he would accept the benefits secured by the contract, or waive them and retain his right of action for damages. He knew, if he accepted the benefits secured to him by the contract, that it would operate to release his right to the other remedy. After the injury happened, two alternative modes were presented to him for obtaining compensation for such injury. With full opportunity to determine which alternative was preferable, he deliberately chose to accept the stipulated benefits. There was nothing illegal or immoral in requiring him so to do. And it is not perceived why the court should relieve him from his election in order to enable him now to pursue his remedy by an action at law, and thus practically to obtain double compensation for his injury. * * *"

Then again in the case of *Hamilton v. St. Louis, K. & N. W. R. Co.,* 118 F. 92, it was stated by the Court in pointing out that such a contract is of benefit to an employee, saying, p. 93:

> "It has been held by a long line of cases including some of controlling authority upon this court that

contracts like that in question are not only opposed to sound public policy but are conducive to the well being of those whom they immediately affect. This is so held because the becoming a member of the 'Relief Department' by an employe is entirely optional with himself and because his right to sue for damages resulting from the employer's negligence is reserved to him until after an injury is received, and even then until with full knowledge of all the facts surrounding his case, he makes his election whether to avail himself of the benefits secured to him by his membership in the department or to resort to his action at law for damages. * * *"

Allowing plaintiff to testify as to what he intended, i. e. what his mental assent was is in direct violation of the parole evidence rule. It was objected to at the time and should have been excluded. (T. 145)

Plaintiff's acceptance of the offer even though he may have misunderstood the matter is not grounds for relieving him of the obligations of his contract and actions.

Williston on Contracts, Vol. 1, Sec. 94, p. 294:

"It follows from the principle that manifested mutual assent rather than actual mental assent is the essential element in the formation of contracts, that a mistaken idea of one or both parties in regard to the meaning of an offer or acceptance will not prevent the formation of a contract. Such a mistake may, under certain circumstances, be ground for relief from the enforcement of the contract. But this relief is in

its origin equitable, and is in its nature a defense to the enforcement of the contract of which advantage may or may not be taken, rather than a defect in the formation of the contract. It follows that the test of the true interpretation of an offer or acceptance is not what the party making it thought it meant or intended it to mean, but what a reasonable person in the position of the parties would have thought it meant. The sound view has been well expressed by L. Hand, J.: 'A contract has strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.' "

There being no pretense of mutual mistake or fraud, it was the duty of the lower Court to hold the plaintiff to his contractural arrangement and dismiss this action.

SPECIFICATION OF ERROR NO. V

The Court should have construed the written documents and the legal effect thereof and instructed the Jury accordingly rather than to submit the written documents, namely, the insurance policies and drafts to the Jury to construe the legal rights of the respective parties thereunder. (Raised on motion for new trial (T. 27), also in connection with instructions (T. 175).)

"Mr. Powers: I will object to the Court's instruction with respect to the insurance policies, leaving to the Jury the question of what the contract and the other documents are, to construe the agreement. My position is that it is for the Court to construe the written documents. * * *"

1930 *Oregon Code,* Sec. 2-305;

Anderson v. Hartford Accident & Indemnity Co., 152 Or. 505 (53 P. (2d) 710, 54 P. (2d) 1212).

ARGUMENT

The uncontroverted facts that plaintiff received these drafts as compensation in connection with his same injuries after making demand on the insurance adjuster and the drafts referring to an insurance policy and as plaintiff stated that he supposed there was a policy behind the payments, required the Court to construe the legal effect of the contractual relationship. Plaintiff's claim now of "non mental assent" or "silent mental reservation" is belied by his overt acts and is insufficient to overcome this contract arrangement. Section 2-305 of the Oregon Code, 1930, imposes upon the Court the duty to construe instruments in writing. The material part of this statute reads as follows:

"* * * the construction of statutes and other writings * * * are to be decided by the court * * *"

The Supreme Court of Oregon in the case of *Anderson v. Hartford Accident & Indemnity Co.* construed an identical provision from an identical policy as a matter of law. It was a case in which was involved a policy and workmen's compensation endorsement thereon identical in language to that in the present case, it was contended by an injured employee that he should not be bound by the provisions of the policy, that they were "not incorporated in and made a part of (the) contract" between himself and defendant. The plaintiff there did not know the terms of the policy and was in much the same position as plaintiff is in here. However, the Supreme Court of Oregon held that under the dealings of the parties the policy was part of their contract and the provisions of the policy had to be considered in determining contractural relationship. The Court said, p. 510:

> "In accepting the view that the provisions of the insurance policy as to payment of benefits became a part of the contract between the plaintiff and the defendant, the provision of the policy as to arbitration is not to be disregarded, and it should be borne in mind that compliance therewith is as essential as the observance of any other term or condition of the agreement."

In that case the pertinent provision of the contract had to do with medical arbitration. Here in our case the pertinent provision of the contract is that compensation

when accepted is "* * * in lieu of all other claims or demands because of such injury." (T. 157).

And the Trial Court as a matter of law should have construed this provision of the contract as binding upon the plaintiff and dismissed the within action.

SPECIFICATION OF ERROR NO. VI

Assuming it was proper to submit issue to Jury, Court should have instructed Jury to reduce pro tanto from any recovery the amount already received by plaintiff by way of compensation payments and payments made for his benefit for medical expense.

The Court erred in failing to instruct that the verdict would have to be reduced pro tanto (T. 176):

> (Mr. Powers) "It appears that there has been paid to the plaintiff and for his benefit something in the neighborhood of—I haven't the complaint here, but over $750.00, seven hundred and fifty or some such amount, and the evidence shows that that was paid after the alleged second injury. It seems to me that the jury ought to be instructed in that regard some way. * * *"

DEFENDANT ENTITLED TO HAVE VERDICT REDUCED PRO TANTO IN AMOUNT PAID PLAINTIFF.

ARGUMENT

In any event the amount already paid to the plaintiff and paid for the plaintiff's benefit should have been credited on verdict..

Mandeville v. Jacobson, 189 Atl. 596 (Conn. 1937), 598:

> "The amount paid for a release should be credited on the verdit or judgment rendered. Beckwith v. Cowles, supra, 85 Conn. 567, at page 571, 83 A. 1113; Union Pac. Ry. Co. v. Harris, 158 U. S. 326, 333, 15 S. Ct. 843, 845, 39 L. Ed. 1003; Ingram v. Carlton Lumber Co., 77 Or. 633, 643, 152 P. 256, 259; Sanford v. Royal Ins. Co., 11 Wash. 653, 664, 40 P. 609, 612; 63 C. J. 1234."

It is to be noted that this recent Connecticut case cites in support of this doctrine the Oregon case of *Ingram v. Carlton Lumber Company.* It is submitted that the Court's failure in his charge to the jury to in any way take into consideration the amount which had been paid to the plaintiff and for his benefit was error. Certainly it would allow double compensation; it would allow the plaintiff to have his cake and eat it too.

CONCLUSION

It is respectfully submitted the Court erred with respect to each specification of error raised on this appeal.

Plaintiff assumed the risk because the risk was an ordinary one incident to his employment; because he used his own appliance; because he had comparative knowledge or equal knowledge with his employer; because the jack is a simple tool; because plaintiff created his own working conditions; because there is no duty on the employer to furnish the latest and most improved appliances. Moreover to permit this judgment to stand would permit plaintiff to receive double compensation for the same injury; it would permit him to split his demand and cause of action; it would permit him to retain the fruits and benefits of his contract without being held to its obligations; it would relieve him from his election to accept compensation which is imposed upon all workmen who are paid compensation under the terms of the State Workmen's Compensation Act; it would render nugatory the settlement including all the releases signed on the back of each draft without any pleading or proving of fraud or mistake. Contracts voluntarily entered into by parties should be upheld. Settlements are favored by the law and it is earnestly urged that the defendant under the law is entitled to have this judgment reversed.

Respectfully submitted,

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Attorney for Appellant.